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No. 87-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION,
et al., Appellants,

v.

STEVEN GARFINKEL,
et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellees advance two principal arguments in this Court as a basis for affirming the judgment below. First, appellees contend that they are in compliance with the statute as they read it. Second, appellees endorse the district court's declaration of unconstitutionality based on an extremely broad view of unimpeded executive power in national security matters — a view that would override Section 630 in its entirety, as well as numerous other laws relating to national security, no matter how they are construed. Before addressing appellees' statutory and constitutional arguments, we will examine briefly the form of judgment that appellees are asking this Court to enter.

The district court concluded that appellees had violated Section 630, but held that statute unconstitutional on its face under the doctrine of separation of powers. In this Court, appellees argue that the Executive Branch is now in compliance with Section 630, as they construe that statute, based on the actions that they have taken in the months following the district court's decision. Based on these subsequent actions, appellees assert

that "[t]he judgment of the district court sustaining the validity of the nondisclosure forms and denying appellants equitable relief should be affirmed." Appellees' Br. at 51.

Appellees' request for affirmance on this basis should be rejected because the district court did not pass on the validity of the amended SF 189 or SF 4193 forms or on whether appellants were entitled to equitable relief. Rather, the district court issued a sweeping declaration that Congress has no power to enact legislation regulating disclosure of national security information. Accordingly, even if events that occurred after the district court decision have brought appellees into compliance with Section 630 (which we dispute), the appropriate remedy would be to vacate the district court's judgment rather than to affirm it, since appellees' subsequent compliance would have deprived appellants of the opportunity to have that ruling reviewed. *United States v. Munsingwear*, 340 U.S. 36 (1940).

There are several reasons, however, why the Court should not vacate the judgment below as moot and order the complaint dismissed, but instead should vacate (or reverse) the judgment and remand the case for further proceedings. First, appellees' assertion that they are in compliance with Section 630 based on their subsequent actions depends on numerous facts that are not in the record, including several actions that have been construed in conflicting ways by different parties and *amici*. While we disagree that these subsequent actions have remedied the violations of Section 630 caused by the unlawful use of the banned forms, we recognize that it would be more appropriate for the district court to rule on these issues in the first instance on the basis of a fully developed record, with any further appeal going to the court of appeals rather than directly to this Court. *See* Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988) (eliminating direct appeal jurisdiction).

Second, the district court prematurely declared every aspect and application of the statute unconstitutional without first

finding violations of each of Section 630's requirements. This approach violates the time-honored principle that courts are to decide constitutional questions only when required to do so by the precise facts of the case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring in part, dissenting in part). Accordingly, as part of its remand order, the Court should direct the district court first to decide whether appellees are still in violation of each of Section 630's provisions, and then and only then reach the question of whether those provisions as applied violate the doctrine of separation of powers.

Third, the district court erred in declaring the entire statute unconstitutional without any evidence that its provisions impair the Executive Branch's ability to carry out its constitutional functions, as required by *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). As a practical matter, the district court's unprecedented ruling that Congress has no power to enact any portion of Section 630, including even its ban on use of the term "classifiable," acts as an insurmountable barrier to any judicial review of appellees' compliance with Section 630 on remand. Accordingly, appellants ask this Court to vacate or reverse the district court judgment and remand the case with instructions to the district court to decide only those constitutional issues that are implicated by the facts of this case under the standards set forth in *Nixon v. GSA*.

Given the history of this litigation, it is entirely likely that a remand will lead the political branches to take additional actions to resolve this dispute that they have been unwilling or unable to take in the face of the district court's blanket declaration of unconstitutionality. Therefore, once this obstacle is removed by an order vacating or reversing that decision, further accommodation between the political branches may obviate the need for resolution of the constitutional issues by the district court, let alone by this Court.

I. Appellees' Subsequent Actions Have Not Corrected Their Prior Noncompliance With Section 630.

Appellees no longer contend that their actions prior to the district court's decision complied with Section 630. Instead, they urge the Court to find that their subsequent actions have brought them into compliance with Section 630. However, upon close examination, it is clear that appellees have not fully corrected their past violations of the statute, and that there is, at a minimum, sufficient evidence to warrant a remand to resolve whether these violations have been remedied.

A. The district court concluded that appellees had violated Section 630's express ban on the implementation of Standard Forms 189 and 4193. App. 22a n.16. Because it is undisputed that appellees continued to require employees to sign those very forms, the court never had to decide whether the forms contained any of the five provisions also prohibited by Section 630 in order to find a violation. Although appellees have now ceased requiring employees to execute SF 189 and SF 4193, thereby rendering appellants' request for an injunction to that effect moot, approximately 49,000 of these forms were executed during the funding ban in direct violation of Section 630. *Congress & the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th Cong., 2d Sess. 166, 173, 188 (1988) ("1988 Hearing") (GAO Testimony). Therefore, the question is whether appellees' subsequent actions have remedied the harm caused by the illegal execution of these 49,000 forms.

After the district court declared the term "classifiable" unconstitutionally vague, appellees sent a notice to those signatories who were still employed by the federal government, informing them that the term "classifiable" had been deleted from SF 189 and SF 4193 and that a new definition of protected information had been added. However, appellees did not provide any such

notice to signatories who were illegally required to sign the forms after the December 1987 ban, but who since have left government service. *See* Appellees' Br. at 31 n.24. Because these former employees, who may number in the thousands, have never been apprised that appellees will no longer enforce the ban on disclosures of "classifiable" information, they are still chilled from making such disclosures, and appellees' violation of the ban on the use of the term "classifiable" has not been remedied and hence is not moot as to them.[1]

B. Second, appellees' corrective notice does not bring the SF 189 and SF 4193 forms into compliance with Section 630 even as to those employees who received the notice because it expressly states that employees are liable for disclosures of information that they know *or have reason to know* is classified or being classified, even though it is unmarked. This "reason to know" standard is inconsistent with Section 630(1), which limits nondisclosure forms to unmarked information that the employee knows is either classified or being classified.[2]

As the congressional hearing in support of the renewal of Section 630 makes clear, the actual knowledge standard was

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[1]Contrary to appellees' contention at footnote 24 on pages 31-32, appellant American Foreign Service Association has standing to litigate this claim since its members include both current and retired foreign service officers, and the complaint sought an order directing the Secretary of State "to treat all SF 4193 agreements executed on or after December 22, 1987, as void, and to notify *all* State Department *signatories* that such agreements are void." J.A. 10 (emphasis added).

[2]Appellees' issuance of SF 4355 and SF 312 did not alter this controversy because employees have not executed the new forms in place of the forms signed in violation of Section 630. Moreover, although the new forms and their implementing regulations were not challenged in this complaint, they also violate Section 630's actual knowledge requirement, which is a further reason why this aspect of the case is not moot.

included to ensure both that the uncertainty surrounding the term "classifiable" could not be reintroduced through a backdoor device and that would-be-whistleblowers could not be required to consult with their superiors before disclosing unclassified, but embarrassing, information. 1988 Hearing at 21 (Rep. Boxer); *id.* at 67, 75-76 (Sen. Grassley); Comm. on Gov't Operations, *Legislation Needed to Curb Secrecy Contracts*, H.R. Rep. No. 911, 100th Cong., 2d Sess. 10 n. 36, 19-20 (1988). However, the "reason to know" standard can be used to do precisely what Congress tried to prevent. Because "reason to know" has no fixed meaning in this context, it leaves agency decisionmakers with essentially unfettered discretion to create unreasonable obligations. As a result, signatories do not know in advance the circumstances in which they will be deemed to have sufficient knowledge to subject them to the forms' requirements.

Appellees' brief confirms the ambiguity inherent in their "reason to know" standard. On the one hand, appellees attempt to equate it with negligence, suggesting that it has both a defined and narrow meaning. *See* Appellees' Br. at 16, 17, 28, 34, 35, 36, 37, 39. In other places, however, they define this standard in extremely broad terms that go far beyond negligence. Thus, appellees contend that "[i]f the employee has *any doubt* about whether particular information may be disclosed, he must err on the side of nondisclosure and inquire about the classified status of the information." *Id.* at 38 (emphasis added). Elsewhere, appellees suggest that this duty to inquire arises *whenever* an employee is uncertain about the status of information or *whenever* an employee has *reason to believe* that information *might* be classified. *See* Appellees' Br. at 39-40; *accord* Sen. Br. at 17-18.

Under the "any doubt" standard, as well as the latter tests, a supervisor could determine that an employee has an obligation to confirm that any unmarked information is not classified or being classified whenever it could "conceivably" be classified. Since any information that "concerns . . . foreign relations or

foreign activities of the United States" may be classified under Executive Order 12,356, § 1.3(a)(5), foreign service officers could rarely have no doubt that unmarked information has not been classified, particularly in light of the persistent problem of government overclassification of records. *See, e.g.*, Information Security Oversight Office, *Annual Report to the President FY 1987*, at 28 (1988) ("ISOO Report") (between 4.9% and 7.6% of sample documents unnecessarily classified in whole or in part); The Washington Post, Feb. 15, 1989, at A25 (former Solicitor General Erwin N. Griswold stating there has been "[no] trace of a threat to national security from the publication" of the previously top secret Pentagon Papers). Therefore, given the breadth of the "any doubt" standard, appellees are mistaken in their assertion that the old forms as amended by the corrective notice "will be fully understood by the signatories to apply only to those categories of information that are at the core of the President's constitutional duty to protect the national security." Appellees' Br. at 31.

To the contrary, by requiring employees to check with their supervisors whenever they have "any doubt" that unmarked information might be classified or in the process of a classification determination, the forms impose a prior restraint on disclosures of a vast range of unclassified information. Consequently, retired foreign service officers may be deterred from writing articles or giving speeches about foreign policy matters. In addition, while "the employees' inquiry presumably will produce a clear answer about the current status of the information," Appellees' Br. at 40, it may also lead to retaliation against the employee who thereby indicates that he or she plans to disclose information about illegal or embarrassing agency activities. *See* 1988 Hearing at 67, 75-76 (Sen. Grassley expressing fear that this would occur).

In this way, the "reason to know" standard directly impedes the confidentiality that Congress believed is essential to encour-

age whistleblowing about such matters as defective military weapons, budget overruns, and fraudulent purchasing practices. *See* 5 U.S.C. § 1206(b)(1); Inspector General Act, 5 U.S.C. App. 3, § 7(a) & (b). As a result, an employee who would like to blow the whistle on such conduct may instead choose to follow the safer course and keep quiet, particularly since he or she has little recourse in the event an inquiry results in a security clearance revocation. *See* Exec. Order 10,450, 3 C.F.R. 936 (1949-1953 Comp.); 3 Foreign Affairs Manual § 163.4 (1987). Therefore, although the deletion of the term "classifiable" and use of the substitute language has removed the prospect of after-the-fact classifications as a means of punishing whistleblowers, it has not eliminated the kind of uncertainty and chill that Congress sought to eliminate in subsections 1 and 2 of Section 630. At a minimum, there is sufficient ambiguity about the meaning and effect of the "reason to know" standard and whether use of that standard complies with Section 630 to warrant remanding the case so that the district court can consider this issue in the first instance based on a full and current factual record.

C. Appellants also contended below that the nondisclosure agreements violated subsections 3 and 4 of Section 630 because they require employees to obtain prior authorization before communicating any classified information to a Member or committee of Congress. *See infra* at 9 n. 3. This requirement stems from the forms themselves, which prevent disclosures of classified information except to "authorized" persons, and from statements made by appellee Garfinkel that Members of Congress are not "authorized" to receive classified information by virtue of their status as Members of Congress. Appellees' Br. at 47 n.38. Moreover, appellees' brief plainly reveals that they do not consider Members of Congress authorized to receive classified information without prior approval, Appellees' Br. at 46-48 & n.38, and nothing in the notice sent to the employees who signed SF 189 or SF 4193 or in the new forms even arguably

brings those forms into compliance with these provisions of Section 630.[3]

Before this Court, the House takes the position that, under these forms, Members and committees of Congress should be considered authorized recipients of classified information by virtue of their elected status, House Br. at 14, and the Senate believes that this is an open question. Sen. Br. at 19; *see also* ACLU Br. at 46. However, the Executive Branch, which is the branch that matters for this purpose, takes the contrary position, *i.e.*, that Members are never authorized to receive particular classified information unless and until an Executive Branch official has decided that they have a need-to-know that particular information. Appellees' Br. at 46-48 & n.38. Under this interpretation, an employee could be fired for failing to obtain prior permission to provide a congressional committee information that the Executive Branch has an obligation to report, or for telling the committee that Executive Branch officials have lied about or withheld such information. It would also undercut a foreign service officer's statutory right to "express his views and opinions, and make recommendations he considers appropriate" in response to a request from a congressional committee or

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[3]Appellees mistakenly assert that appellants sought relief without first asking the district court to find that the forms violate this portion of the statute. *See* Appellees' Br. at 17, 50. In fact, appellants contended below that SF 189 and SF 4193 violated this aspect of Section 630, although the district court made no findings on this point. J.A. 7-8, 37; Proposed Findings of Fact ¶¶ 25-27. Similarly, contrary to appellees' suggestion at pages 48-49, AFSA has standing to challenge appellees' noncompliance with subsection 4, which protects Congress' right to obtain information, because Congress can obtain information from Executive Branch employees in the manner protected by Section 630 only if those employees, whom AFSA represents, can safely exercise their rights to provide it. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

committee member that relates to a subject within the committee's jurisdiction. *See* 2 U.S.C. § 194a.

We recognize that, despite this evidence that strongly suggests that the Executive Branch is acting contrary to Section 630, the district court did not make any explicit findings to that effect. Because the district court erred in declaring subsections 3, 4, and 5 unconstitutional without first finding violations of those provisions, the Court should remand the case to the district court to determine the precise manner in which the prior authorization requirement applies to Members of Congress, the extent to which it conflicts with Section 630, and if so, whether this aspect of Section 630 is unconstitutional under *Nixon v. GSA*, assuming that no accommodation can be reached between the branches that would resolve this dispute.[4]

II. Section 630 Does Not Violate the Doctrine of Separation of Powers.

Not only did the district court err in prematurely addressing the constitutionality of Section 630 in its entirety without first finding violations of each of its provisions, but it also based its

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[4]The American Civil Liberties Union erroneously contends that appellants neither alleged violations of subsections 1, 3, 4, and 5, nor asserted that these violations chill employees from making protected disclosures. *See* ACLU Br. at 21-22, 29-37 & nn. 22 & 23, 39. Not only did appellants allege and introduce evidence to show that SF 189 and SF 4193 violated subsections 1, 3, 4 & 5, *see* J.A. 7-8; Proposed Findings of Fact and Conclusions of Law ¶¶ 16, 25-27, 77-79, but they even challenged SF 4355's noncompliance with subsections 1, 3, 4 & 5 after it was issued. *Id.* ¶¶ 17, 52, 53, 80-84; Plaintiffs' Mem. in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment at 5-9 (filed in consolidated cases April 1, 1988); Declaration of Louis C. Brase at 1-3 (filed in one of the consolidated cases, *AFGE v. Garfinkel*, No. 87-2412-OG, April 11, 1988).

declaration of unconstitutionality on a wholly indefensible view of Congress' power in this area and without finding that the statute, as applied, impairs the Executive Branch's ability to perform its constitutional functions, as required by *Nixon v. GSA*. For this reason as well, the district court's judgment should be reversed (or vacated), and the case remanded for further proceedings.

A. Appellees advance a theory of presidential power under which any congressional action that limits in any way the power of the Executive Branch in the area of national security or foreign affairs is unconstitutional. Like the district court, they take the position that Congress can exercise no legislative control over the Executive Branch's handling of national security information, but can only facilitate civil and criminal sanctions and try to obtain information through official cooperation and subpoena battles, but through no other means. Appellees' Br. at 26-27, 37 n.28, 49; App. 23a, 26a.

This view of presidential omnipotence pervades appellees' brief. Thus, appellees contend "that the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have *ultimate and unimpeded authority* over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch." Appellees' Br. at 42 (emphasis added throughout paragraph). Similarly, according to appellees, "[j]ust as the President's roles as Commander in Chief and representative of the Nation in its foreign relations *bar Congress from erecting legislative impediments to his full assumption of personal authority for national security matters*, so too do those roles bar Congress from erecting such impediments to Presidential control over national security information." Appellees' Br. at 27 (citation omitted). For essentially the same reasons, they argue that the President "must have *direct and unimpeded control over the national security information* whose

confidentiality he deems necessary to the successful performance of his duties." *Id.* at 25; *accord id.* at 22 (contending that there is a "constitutional requirement that the President at all times retain control over the implementation of whatever substantive measures the Constitution authorizes Congress to enact in the area of national defense and foreign relations"); *see also id.* at 15, 17, 22, 26, 35-36, 42, 49 n.42.

Appellees' theory of separation of powers — which wholly disregards Congress' legislative authority as well as its independent power to impose conditions on or to withhold appropriations — is entirely without support. In fact, every one of the cases that appellees cite for the proposition that Congress is precluded from enacting legislation in this area concerned Executive Branch authority in furtherance of, or pursuant to, a congressional delegation of authority. *See Department of the Navy v. Egan*, 108 S. Ct. 818 (1988); *CIA v. Sims*, 471 U.S. 159 (1985); *Haig v. Agee*, 453 U.S. 280 (1981); *Cole v. Young*, 351 U.S. 536 (1956); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). These cases do not support the Executive Branch's contention that it can act contrary to a statute like Section 630, and this Court has *never* upheld an Executive Branch action in the foreign affairs or national security area that contravened a specific act of Congress. Indeed, if appellees were correct in their theory of unfettered executive power over national security matters, including security clearance determinations, then this Court erred in deciding *Webster v. Doe*, 108 S. Ct. 2047 (1988), as it did, and it engaged in an empty exercise in construing the statutes at issue in *Egan* and *Carlucci v. Doe*, 109 S. Ct. 407 (1988), since the outcomes in those cases were constitutionally ordained.

In other contexts as well, this Court has refused to accord absolute deference to Executive Branch determinations on national security matters, which, under appellees' theory, it had an

obligation to do. *See United States v. Nixon*, 418 U.S. 683 (1974); *New York Times v. United States*, 403 U.S. 713 (1971)(concurring opinions of Justices White, Stewart, Marshall, Black & Douglas); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Not only does appellees' argument conflict with the decisions of this Court, but it also ignores the specific authority granted to Congress in the Constitution to act in the areas of foreign affairs and national security through its legislative, appropriations, and other powers. *See* Opening Br. at 22-25; AFL-CIO Br. at 13-15.

Appellees' argument is also undercut by this Court's decision in *Morrison v. Olson*, 108 S. Ct. 2597 (1988). In that case, the Executive Branch made a similar argument that the Constitution required that the President have unimpeded control over the appointment, direction, and removal of all prosecutors. United States *Amicus Curiae* Brief in *Morrison v. Olson* at 3, 5-16. However, this Court rejected those arguments and upheld the independent counsel statute, which places significant limits on the President's power over independent counsel. *Morrison*, 108 S. Ct. at 2617-19, 2620-22. Accordingly, just as it rejected the Executive Branch's absolutist position in *Morrison*, the Court should reject the equally absolutist argument made by appellees here.

If, as appellees contend, Congress cannot impede the Executive Branch's ability to act in the area of national security and foreign affairs, Congress would be precluded from passing any statute limiting the use of any terms in nondisclosure agreements, including unconstitutionally vague terms like "classifiable." It would also invalidate the portion of the national security exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(1), which allows district courts to review classification determinations. *See also* Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (requiring judicial authorization for foreign intelligence surveillance for more than one year);

McGehee v. CIA, 718 F.2d 1137 (D.C. Cir. 1983) (authorizing judicial review of Executive Branch prepublication review determinations to ascertain whether withheld information is both actually and properly classified). Moreover, under appellees' theory, Congress could not provide any protections, even purely procedural ones, for employees who stand to lose their security clearances because the President must have direct and unimpeded control over all such matters.

Why appellees urge such an all-encompassing theory of presidential power in this case, or what that theory has to do with the modest requirements of Section 630, is not apparent. Indeed, despite the claimed basis for the application of this theory here — that the President himself must exercise control over all national security information and over all employees who have access to it — Section 630 operates principally on people and information that never implicate presidential prerogatives. Appellees' Br. at 19-21 & n.17, 25, 42. This is confirmed by the fact that 10,000,000 new classification decisions are made annually, ISOO Report at 1, 6, 9, that the number of current and former employees covered by the nondisclosure forms reached nearly 3,000,000 at last count, 1988 Hearing at 156-66, 170-71, 187, and that the challenged nondisclosure forms are used by agencies such as the Interstate Commerce Commission, the Marine Mammal Commission, the Federal Communications Commission, and the Securities and Exchange Commission, which are independent of the President and have limited access to classified information. GAO, *Information & Personnel Security: Data on Employees Affected by Federal Security Programs* 8 (1986).

Moreover, the challenged terms of the nondisclosure forms did not even emanate from the President; neither Executive Order 12,356 nor National Security Decision Directive-84, both of which the President did issue, call for use of the terms that have been forbidden by Section 630, nor do they mandate a prior

authorization requirement for disclosures to Congress. Exec. Order 12,356, § 4.1(a) & (c) (Congress may have access to classified information "for the accomplishment of lawful and authorized Government purposes" without any mention of prior authorization); *id.* § 5.4(b)(1) (sanctions only for disclosure of properly classified information); J.A. 11 (same). As we explained in our opening brief at 20-30, there is no basis in the Constitution or this Court's decisions for such a broad claim of presidential supremacy regarding national security information, and the district court's acceptance of this claim was plainly in error.

B. Aside from their general and unsupported theory of unlimited presidential power, appellees offer no specific constitutional justification for the use of the term "classifiable," and make no attempt to comply with *Nixon v. GSA* by showing how banning use of that term has impaired the Executive Branch. Appellees also make only the slightest effort to establish such an impairment with respect to the knowledge requirement of Section 630, but in attempting to do so they misstate the effect of the law. Thus, while appellees argue that subsection 1's knowledge requirement prevents the Executive Branch from taking any action to punish an employee who makes negligent disclosures of unmarked classified information, Appellees' Br. at 16, 34-35, 36-37, 39, that is not what Section 630 does.

Section 630 was aimed at the Executive Branch's attempt to impose new obligations on federal employees by making them sign nondisclosure agreements that give the Executive Branch a host of new legal remedies. Thus, although Section 630 forbids the creation of certain new contractual obligations, it does not alter whatever remedies the Executive Branch may otherwise have at its disposal by virtue of statutes, executive orders, or even its inherent authority. If, for example, the Executive Branch has some other authority to deny an employee access to classified information or to revoke an employee's security clearance for

improperly disclosing unmarked information, that authority survives Section 630.

The question then is whether banning a contractually based "reason to know" standard unconstitutionally impairs the Executive Branch's ability to carry out its constitutional functions. Aside from the fact that appellees offered no evidence that contracts containing a "reason to know" standard are necessary to safeguard national security information, there are few, if any, situations in which the actual knowledge standard could result in classified information being disseminated for two reasons.

First, Section 630 imposes no knowledge requirement for information that is marked classified. Since the vast majority of classified information is so marked, as required by Executive Order 12,356 and agency regulations and directives, employees may be held responsible even under Section 630 for the unauthorized disclosure of most classified information without any proof that they knew it was classified.

Second, in virtually all situations in which information subject to the nondisclosure forms is not marked classified, the employee will know (or the Executive Branch can ensure that the employee will know) that the information is either classified or in the process of a classification determination. Thus, employees who have access to raw intelligence or to classified briefings are presumably told about the classified nature of that information. Similarly, employees who generate unmarked notes of a classified briefing, or who are given a manuscript that has not yet undergone prepublication review, would actually know that such information must be safeguarded and that they have a duty to ensure that others who have access to it are instructed likewise. Thus, there are likely to be few, if any, situations in which the absence of a contractually based "reason to know" standard will prevent an employee from being disciplined for improperly handling classified materials.

Moreover, even if there is some disruption of the Executive

Branch, *Nixon v. GSA* requires the Court to balance that disruption against Congress' interest in imposing this limitation. In enacting Section 630's knowledge requirement, Congress made a choice as to whether the Executive Branch or federal employees should bear the burden of ensuring that employees know whether unmarked information may not be disclosed — a choice that is well-suited to a legislative determination. While the Executive Branch would prefer to have employees bear that burden by imposing a contractual duty to inquire whenever they have "any doubt" about the status of information, it is not unconstitutional for Congress to place that burden on the Executive Branch, which has control over the marking of classified records and the briefing of employees who have access to classified information that may not be marked or information that is in the process of a classification determination. The Executive Branch has not argued, let alone produced any evidence to show, that bearing this burden significantly impairs its ability to function, particularly since it has unimpeded authority under Section 630 to establish the standards governing both classification determinations and the instructions that are conveyed to federal employees.

C. Finally, there is no dispute over the effect of subsections 3, 4, and 5, which all parties and *amici* agree do not change the existing rights of Congress and Executive Branch, but merely prevent the Executive Branch from imposing additional burdens on the exercise of such rights through nondisclosure forms. Since these provisions simply maintain the status quo, they do not impair the Executive Branch's ability to carry out its constitutional functions, and there is no basis for appellees' constitutional attack on them.

In a footnote, appellees urge the Court to decide that subsections 3, 4, and 5 are unconstitutional by contending that federal employees have no right to disclose any classified information to a Member or committee of Congress under the First Amendment

right to petition, 5 U.S.C. § 7211, or any other statute. Appellees' Br. at 49-50 n.43. In making this argument, appellees allow no exceptions for information that is subject to a mandatory reporting requirement, that pertains to waste, fraud, or illegal conduct, or that is provided to a Member or a congressional committee with jurisdiction over the underlying subject matter and with adequate security to safeguard the information. Indeed, appellees' position would prevent Congress from passing any law ensuring its own access to national security information without prior Executive Branch approval. However, the Court need not decide whether Congress is barred from passing any such laws because, as the parties and *amici* agree, Section 630 merely forbids the Executive Branch from unilaterally imposing additional obstacles on the exercise of existing rights, and that requirement is plainly constitutional.

CONCLUSION

For the foregoing reasons and those set forth in appellants' opening brief, this Court should vacate or reverse the district court's judgment and remand the case for further proceedings.

Respectfully submitted,

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